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Co-Beneficiaries of California Deeds of Trust & Multiple Holders of a Note– What One Must Do if they want to Foreclose without Agreement of other Co-Beneficiaries.

The “beneficiary” of a deed of trust is the lender. If the borrower defaults, the beneficiary may instruct the trustee to begin foreclosure proceedings. Sometimes there is more than one beneficiary, such as when they each have contributed a percentage of the loan funds, and are each assigned a fractional interest in the note and deed of trust. A problem arises if they do not all agree to foreclose.

In *Perkins v Chad, Development Corp.*, The borrower had defaulted on loan payments, and had let the property taxes go in to arrears. One co-beneficiary wanted to proceed to a nonjudicial foreclosure, the other did not. The property was foreclosed, and the buyer brought a quiet title action to clear title in his name. A third party intervened, claiming an equitable interest in the property. His argument was that the foreclosure sale was not valid because the Notice of Default and Election to Sell had not been executed by both co-beneficiaries. The court did not agree.

The court first noted that joint beneficiaries have a community of interest in the secured obligation akin to a joint venture or partnership, and any of them should have sufficient agency powers to record the notice of default to protect their mutual interests. As a co-beneficiary, beneficiary Perkins was a tenant in common in the beneficial interest under the note and trust deed. A cotenant has a right to protect the estate from injury or loss without the aid or assistance of other cotenants. As the borrower had defaulted on trust deed and had permitted the taxes to go delinquent, Perkins as a cotenant was entitled to protect the common beneficial interest by foreclosing the security.

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Thus, the court has indicated that each co-beneficiary may individually proceed with foreclosure, but the trustee is not forced to proceed on the signature of one. The trustee is concerned about litigation from the other parties, and is unlikely to proceed. Luckily, there is a Civil Code procedure that may solve the problem, if the co-beneficiaries all reach an agreement in writing at the inception of the loan.

is a statutory procedure that provides for recording an agreement to allow foreclosure by co-beneficiaries holding greater than 50% interest. Civil Code section 2941.9 provides that

“All holders of notes secured by the same real property or a series of undivided interests in notes secured by real property equivalent to a series transaction may agree in writing to be governed by the desires of the holders of more than 50 percent of the record beneficial interest of those notes or interests...” “A description of the agreement shall be included in a recorded document such as the deed of trust or the assignment of interests.”

As a description of this agreement must be provided in the deed of trust, it must be entered at the onset of the transaction. An indication from one of the lenders that they would not so agree should be a warning to the others of trouble ahead.